The European Human Rights Influence upon UK Extradition - Myth Debunked

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Introduction

Within the United Kingdom the perception exists that human rights law emanating from Europe hinders extradition. This notion is fostered and held by the segments of the press and various politicians. For example, following a decision in the European Court of Human Rights (ECtHR) discussed below, it was written in the UK's Daily Mail "It is not only the Prime Minister and the Home Secretary, Theresa May, who are exasperated and frustrated… It is also, for want of a better description, the man on the Clapham omnibus who wonders how the twisted minds of these judges reach such rulings which have been on so many occasions just plain bonkers".[1] The belief that European human rights law frustrates extradition is almost entirely fallacious, and, disturbingly, it acts to mask significant features and distinctions within the legal regimes protecting human rights affecting extradition within Europe. This article will explain the germane UK and European law in the area of extradition generally and with reference to two recent authorities, Ahmad v United Kingdom[2] decided by the ECtHR and Re Request for Preliminary Ruling in the case of Ciprian Vasile Radu[3] decided under EU law. These two authorities are discussed because they highlight the limited practical effect of human rights upon extradition in the European context. For example, mandatory life sentences without a possibility of parole and objectively severe conditions of detention have not acted to prevent extradition. Through a critical explanation of the law and these recent authorities it will be established that the popular conception that European human rights law acts to the detriment of extradition and international criminal justice is misplaced. In addition to this central conclusion, this article will make two related secondary points – one specific to EU law and one to Convention jurisprudence. Firstly, it will be seen that the EU's Charter of Fundamental Rights and Freedoms (Charter) does not materially impact upon the operation of the European Arrest Warrant (EAW) at present (it may, however, do so in the future). Secondly, in regard to Convention-related jurisprudence, a relativist approach in the application of fundamental human rights in an extradition context will be demonstrated – in spite of explicit pronouncement to the contrary – lessening the impact of human rights upon extradition in certain cases.

United Kingdom Extradition Law[4]

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[1] Moncrieff, C., Abu Hamza extradition: The UK must assert its sovereignty on human rights, Daily Mail, 10 April 2012. The decision, ironically, rejected arguments against extradition.

[2] (2013) 56 E.H.R.R. 1.

[3] Both the Advocate General's Opinion in the case and the Grand Chamber (ECJ) decision itself are relevant. Case C-396/11, Radu, 29 January 2013, Grand Chamber, Court of Justice, cited at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CJ0396:EN:HTML. The Opinion of Advocate General Sharpston, 18 October 2012, is cited at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CC0396:EN:HTML.

[4] See generally *A Review of Extradition*, published in September 2011 (the Baker Review) and the Human Rights Joint Committee's Fifteenth Report, *The Human Rights Implications of UK Extradition Policy*, published in June 2011. Leading academic sources are Jones, A. and

Extraditions from and to the UK are governed by the Extradition Act 2003 (the 2003 Act). The 2003 Act has spawned considerable jurisprudence, commentary and criticism, largely because of the role given to human rights by it. It was passed to modernise and streamline the processing of extradition requests submitted to the UK.[5] Specifically, the 2003 Act was enacted to give effect to the recommendations in *The Law on Extradition: A Review*, March 2001[6], and to implement the European Union's Council Framework Decision on the European Arrest Warrant and the Surrender Procedures between Member States of 13 June 2002 (Framework Decision)[7].

Two sets of arrangements under the 2003 Act govern the majority of UK extradition cases, under Part 1 and Part 2. Part 1 of the 2003 Act relates to surrender of persons to Category 1 territories. These are the 28 territories (all EU states and Gibraltar) which have implemented the Framework Decision.[8] Territories not designated Category 1 and having regular extradition relations with the UK are designated Category 2.[9] There are notable differences between the requirements for rendition of persons to each group. Requests from Category 2 territories must include *prima facie* evidence of guilt, under section 84 of the 2003 Act – unlike requests from Category 1 territories. That requirement can be waived, and has been for countries including United States.[10] The extradition process to Category 2 states entails the involvement of the Secretary of State and Scottish Ministers, also unlike Category 1. Considered by Ministers are the death penalty, speciality and the requested person's earlier transfer from the UK. There is not, however, a general political discretion under the 2003 Act to refuse to order an extradition. This had developed, though, under the law of judicial review. It was notably exercised in favour of Gary McKinnon on the basis of human rights.[11] This avenue for persons subject to extradition has been closed,

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Doobay, A., *Extradition and Mutual Assistance*, Third Edition, Sweet and Maxwell, London 2004, and Dickson, D.J., *The Laws of Scotland: Stair Memorial Encyclopaedia*, Extradition, Reissue. There are also numerous academic articles on aspects of the subject, including several by the present author, including Arnell, P., Scots Extradited, [2008] Juridical Review 241, Arnell, P., The Law of Extradition, (2012) 3 Scots Law Times 13, and Arnell, P., The Law of Extradition - the Response to the Baker Review, (2012) 40 Scots Law Times 251 and by other authors Dugard, J., and Van Den Wyngaert, C., Applying the European Convention on Human Rights to Extradition: Opening Pandora's Box?, (1990) 39 ICLQ 757.

[5] Baker Review, supra note 4, at page 23.

[6] The 2001 Review is found on the National Archive's website, at http://webarchive.nationalarchives.gov.uk/20071204153757/http://www.homeoffice.gov.uk/documents/extradition-law-080601?version=1.

[7] 2002/584/JHA.

[8] Designated as such by SI 2003/3333, SI 2004/1898, SI 2005/365, SI 2005/2036 and SI 2013/1583. See further Mackeral, M., 'Surrendering' the Fugitive—The European Arrest Warrant and the United Kingdom, (2007) 71 Journal of Criminal Law 362.

[9] These are states who are party to the European Convention on Extradition 1957, members of the London Scheme for Extradition within the Commonwealth or party to a bilateral extradition treaty with the United Kingdom.

[10] Under s 84(7) of the 2003 Act. This has been done by s 3(2) of SI 2003/3334.

[11] McKinnon's was the first case in which this right was recognised, in McKinnon v Government of the United States of America [2005] EWHC 762 (Admin).

following the Crime and Courts Act 2013.[12] In regard to the rendition of persons to both Category 1 and Category 2 territories the extradition judge[13] must consider several possible bars to extradition including human rights.

Sections 21 and 87 of the 2003 Act oblige judicial consideration of human rights within the extradition process in regard to Category 1 and 2 respectively. Human rights are a possible bar to extradition, as are double jeopardy and the passage of time. Section 21(1) provides "If the judge is required to proceed under this section… he must decide whether the person's extradition would be compatible with Convention rights within the meaning of the Human Rights Act 1998". Section 87(1) applies similarly to extraditions to Category 2 territories. It is under these sections that the vast majority of human rights questions have come to be considered in UK courts. From an intra-UK perspective, then, sections 21 and 87, together with section 6 of the Human Rights Act 1998 have brought human rights to extradition proceedings.[14]

It is the precise manner in which human rights apply in the UK that leads to the particular relevance of the Convention, and indeed the Charter. The Human Rights Act 1998 gives effect to "Convention rights". Specifically it obliges all public authorities, including courts, to act compatibly with them. Further, there is a requirement upon UK courts to take into account, *inter alia*, judgements of the ECtHR in coming to their decisions under section 2. The system of individual petition also remains, allowing individuals in certain circumstances to take a case to Strasbourg. The UK's obligation under international law to abide by the terms of the Convention, and to adhere to decisions of the ECtHR to which it is a party under article 46 also, obviously, continue. Therefore, the law as developed by the ECtHR, and indeed the Convention itself, has great relevance for and within the UK – and this fact in itself may explain some of the antipathy felt towards "European human rights". In the context of extradition, European human rights have been relevant since 1989, the year of the landmark ECtHR case of Soering v UK.[15] This was the first time that the ECtHR held that a state party's responsibility could be engaged through an extradition.[16] European human rights-related involvement in extradition therefore

[12] Part 2 of Schedule 20 of the Crime and Courts Act 2013 inserted subsection 11 into section 70 of the 2003 Act, which prevents the Secretary of State's consideration of human rights in Category 2 cases.

[13] Sections 67(1) and 139(1) define the 'appropriate judge' for Category 1 and 2 respectively, this is, in England and Wales, a District Judge designated for the purpose in Scotland, the Sheriff of Lothian and Borders, and in Northern Ireland a county court judge or resident magistrate so designated.

[14] Section 6 obliges public authorities, including courts, to act compatibly with human rights. There are relatively few relevant reported cases in the period between the entry into force of the Human Rights Act 1998 (2 October 2000) and the 2003 Act (1 January 2004). In Serbeh v Governor of Brixton Prison [2002] EWHC 2356 (QB), the court accepted that the Human Rights Act 1998 applied in the context of extradition cases.

[15] (1989) 11 EHRR 439. The ECtHR had considered extradition-related proceedings prior to *Soering*, in the form of an application for provisional release pending an extradition hearing in Sanchez-Reisse v Switzerland, (1987) 9 E.H.R.R. 71.

[16] Amongst a large volume of commentary see Finnie, W., Extradition and the Death Penalty, (1990) 7 SLT 53, Marks, D., Yes, Virginia, Extradition May Breach the European Convention on Human Rights, (1990) 49(2) Cambridge Law Journal 194 and Janik C., and Kleinlein, T,. When Soering went to Iraq...: Problems of Jurisdiction, Extraterritorial Effect and Norm

predates the Human Rights Act 1998 and the 2003 Act. On top of this is the relatively novel effect of the Charter and the related jurisprudence of the ECJ – discussed below.

The European Convention on Human Rights and Extradition

The Convention entered into force in 1953, with the first judgment of the court it created, the ECtHR, being handed down in 1960. It was by no means certain that the ECHR would apply to extradition. It does not contain extradition-specific provision.[17] Perhaps even more significantly, the Convention is limited in its application. Article 1 provides "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". It is not unreasonable to conclude that a requested person would not be protected by the Convention in a non-party to it. Of course that is not the case. The ECtHR has interpreted the Convention to apply to extradition, as indeed it has to other cases which are not obviously within the (territorial) jurisdiction of state parties.[18] It has done so by considering possible future human rights violations in the requesting state – outside the territory of all Council of Europe state parties. This is not to suggest, though, that human rights apply to extradition only in this extraterritorial sense. There exist both "domestic" and "foreign" human rights cases – a distinction first made in UK law by Lord Bingham.[19] Domestic cases centre upon a possible violation of human rights within the extraditing territory – for example on account of the separation from one's family.[20] A foreign case, in contrast, contains an argument that a human rights violation may take place in the requesting country, such as in *Soering*.

Soering is the first ECtHR judgement to hold that a state party would violate the Convention if it were to extradite an individual in the face of substantial grounds for believing that he faced a real risk of ill-treatment. The well-known passage *inter alia* provides:

> "It would hardly be compatible with the underlying values of the Convention… were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief

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Conflicts in Light of the European Court of Human Rights' Al-Saadoon Case, (2009) 1(3) Gottingen Journal of International Law 459.

[17] Article 5(1)(f) permits detention pending extradition but the Convention does provide for the application of human rights to a person subject to the process – in contrast to the Charter, noted below.

[18] There is a considerable body of jurisprudence relating to the non-extradition related extraterritorial application of the Convention, and copious academic literature. The leading cases include Bankovic et al. v. Belgium and 16 other NATO countries, (2007) 44 E.H.R.R. SE5, and Al-Skeini v the United Kingdom (2011) 53 E.H.R.R. 18. Commentary includes Arnell, P, Human Rights Abroad, (2007) 16(2) Nottingham Law Journal 1, Milanovic, M., Al-Skeini and Al-Jedda in Strasbourg, [2012] EJIL 121 and Coomans, F. and Kamminga, M., (eds), *Extraterritorial Application of Human Rights Treaties, Intersentia, Antwerp,* 2004.

[19] In Regina (Ullah) v Special Adjudicator [2004] UKHL 26, at paras 8-9.

[20] A leading domestic is Norris v United States [2010] UKSC 9.

and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article…".[21]

In the decades following *Soering* the ECtHR has upheld, developed and refined this position.[22]

The history of the application of the Convention to extradition is one of substantive expansion, and – importantly for our present purposes - legal and practical limitation. Substantive expansion denotes judicial acceptance of the applicability of further human rights to extradition. In *Soering*, as noted, article 3 was held applicable. The ECtHR also accepted that article 6 might affect an extradition case – albeit exceptionally.[23] Such an exceptional case – the first time that the ECtHR has found that a removal would be in violation of article 6 on account of the prospective proceedings abroad – is Othman v UK.[24] Article 5, protecting the right to liberty and security of the person, was explicitly and definitively accepted as applying to removal cases – albeit the domestic variety - in 2009 in Garabayev v Russia.[25] It was not until 2012 that article 5 was accepted applying in a foreign removal case. This was in *Othman* where it was *inter alia* argued that, if deported, he would be at real risk of a flagrant denial of his right to liberty because of the possibility of incommunicado detention for up to 50 days. After noting the opacity surrounding the applicability of article 5 the ECtHR stated:

"The Court also considers that it would be illogical if an applicant who faced imprisonment in a receiving state after a flagrantly unfair trial could rely on art.6 to prevent his expulsion to that state but an applicant who faced imprisonment without any trial whatsoever could not rely on art.5 to prevent his expulsion".[26]

Therefore, article 5 has clearly been accepted as applying in both domestic and foreign removal cases.

Article 8, protecting private and family life, has been argued at the ECtHR as a basis for preventing an extradition or removal on a number of occasions, including Balogun v UK[27] and Boultif v Switzerland.[28] In *Boultif* the applicant successfully invoked article 8 in a deportation case. A case arguing on the basis of both articles 2 and 3 is H.N. v Sweden.[29] Here the ECtHR entertained, and rejected, the proposition that both

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[21] Supra note 15 at para 88.

[22] There is an academic debate whether foreign cases apply the law in an extraterritorial sense. Of course the act of the state party (the removal), the requested person and the hearing are all intra-territorial. The circumstances that may entail a violation of the Convention, however, are in a third country. In *Soering* the ECtHR stated "The establishment of… responsibility inevitably involves an assessment of conditions in the requesting country against the standards of Article 3 of the Convention", at para 91.

[23] Soering, ibid at para 113. It also considered and accepted the applicability of article 13, guaranteeing the right to a remedy.

[24] (2012) 55 E.H.R.R. 1. Othman was deported, not extradited. As will be mentioned, recent jurisprudence has put an end to any distinction between forms of removal. See further in regard to Othman, Michaelsen C., The Renaissance of Non-refoulement? The Othman (Abu Qatada) Decision of the European Court of Human Rights, (2012) 61(3) I.C.L.Q. 750.

[25] (2009) 49 E.H.R.R. 12.

[26] Ibid at para 232.

[27] (2013) 56 E.H.R.R. 3.

[28] (2001) 33 E.H.R.R. 50.

[29] Application no. 30720/09, 17 December 2012.

articles would be infringed through Sweden's deportation of the applicant to Burundi. Other articles that have been accepted as arguable in the context of an extradition or removal by the ECtHR are article 34 providing the right to individual petition[30], article 4 of Protocol Four prohibiting collective expulsions[31], article 2 of Protocol Four protecting the right to freedom of movement[32] and article 1 of Protocol Seven relating to procedural protections in the course of the expulsion of aliens.[33]

A corollary of the acceptance by the ECtHR of a greater range of human rights as arguable in extradition cases has been the development of tests conditioning their applicability. Clearly a very remote possibility of, say, inhuman or degrading treatment in the requesting territory would not be a practically acceptable basis for non-extradition. Such a test, generally applied, would lead to the complete ineffectiveness of the extradition process. What has happened, and what leads to the perception that human rights hinder the extradition process being erroneous, is the development of a body of case law defining in quite exact terms the tests that must be met for an extradition to be frustrated on the basis of human rights. These cases, instead of frustrating extradition, generally emphasise its utility and importance. This has been especially the case in regard to qualified human rights, such as that under article 8. Therefore, in conjunction with the acceptance of an increasing range of rights as arguable by the ECtHR has been the development of tests that must be met before a proposed extradition is affected.[34] In regard to article 3 the test requires the requested person to demonstrate the existence of substantial grounds for believing that if returned he faces a real risk of being subjected to torture or to inhuman or degrading treatment. The law places the burden upon the requested person to meet the test, which encompasses a high threshold. As was noted in *Balogun* "… in order to violate art.3, treatment must attain a minimum level of severity. This applies regardless of whether the risk of harm emanates from deliberate acts of state authorities or third parties; from a naturally occurring illness; or even from the applicant himself".[35] As we will see in *Ahmad* below the requisite level of severity to successfully engage article 3 is indeed high.

A test similar to that applying in regard to article 3 pertains to article 2, protecting the right to life. In Kaboulov v Ukraine the ECtHR stated that "… in circumstances where there are substantial grounds to believe that the person in question, if extradited, would face a real risk of being liable to capital punishment in the receiving country, Article 2 implies an obligation not to extradite the individual".[36] In such cases the loss of life must be shown to be a near certainty.[37] The test applicable to article 6 differs

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[30] Labsi v Slovakia, Application no. 33809/08, 24 September 2012.
[31] In Hirsi Jamaa v Italy (2012) 55 E.H.R.R. 21.
[32] Stamose v Bulgaria, Application no. 29713/05, 27 November 2012.
[33] Takush v Greece, Application no. 2853/09, 17 April 2012.
[34] "Affected" is the appropriate word as successful arguments do not necessarily lead to non-extradition. In early cases, such as *Soering*, they led to assurances that a capital sentence would not be imposed. In more recent cases assurances in regard to torture, and torture-tainted evidence in the context of a criminal trial, have come into play, such as in *Othman*.
[35] Supra note 27 at para 31 footnotes omitted.
[36] (2010) 50 E.H.R.R. 39. The case concerned the nature of assurances that capital punishment would not be imposed given by Kazakhstan.
[37] *Ullah*, supra note 19 at para 24 per Lord Bingham. See also Baker Review, supra note 4, at p 132.

from that applied to articles 2 and 3. It is that the applicant must demonstrate that he suffered or risks suffering a flagrant denial of a fair trial in the requesting country. *Othman* was the first case where the ECtHR considered more closely the flagrant denial test. It *inter alia* stated in this regard:

> "… that "flagrant denial of justice" is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of art.6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by art.6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that article".[38]

The Court noted that it had not once found that an extradition or removal would be in violation of article 6 since *Soering* was decided in 1989 – *Othman* being the first such case. Also in *Othman* the ECtHR iterated the test applying to article 5:

> "… a Contracting State would be in violation of art.5 if it removed an applicant to a state where he or she was at real risk of a flagrant breach of that article. However, as with art.6, a high threshold must apply. A flagrant breach of art.5 would occur only if, for example, the receiving state arbitrarily detained an applicant for many years without any intention of bringing him or her to trial. A flagrant breach of art.5 might also occur if an applicant would be at risk of being imprisoned for a substantial period in the receiving state, having previously been convicted after a flagrantly unfair trial".[39]

Both articles 6 and 5, then, are conditioned by the same "flagrant denial" test where argued by applicants in extradition and removal cases.

The test conditioning article 8 differs from that applying to articles 2, 3, 5, and 6. It is, however, similar to the extent that it is difficult to meet. The test is that an extradition or removal can only be affected where a person subject to extradition demonstrates that the consequences of interference with the his right to private or family life are so exceptionally serious so as to outweigh the importance of extradition. This test has developed in the course of considerable jurisprudence where article 8 has been argued in extradition and removal cases – both in UK courts[40] and the ECtHR. In Khan v UK[41] the ECtHR considered an article 8 argument in light of his the applicant's proposed deportation. The reasoning centred upon article 8 being a qualified human right and thus legitimately restricted if certain criteria are met. The process of decision making entailed firstly judgement upon whether there was, or would be, an interference with the applicant's right to private or family life. If so, then upon whether the interference was in accordance with law, necessary in a democratic society and in one the stated interests within the article (a legitimate aim such as the

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[38] *Othman*, supra note 24 at para 260. Note that subsequent to the ECtHR decision has been jurisprudence in English courts concerning, amongst other things, the precise nature of the burden in the case. The Special Immigration Appeals Commission has held that on the facts of the case the burden rests on the Jordanian prosecution and UK Government, not Othman. This has been upheld by the Court of Appeal, in Othman v Secretary of State [2013] EWCA (Civ) 277.

[39] Ibid at para 233.

[40] Leading UK cases are HH v Italy [2012] UKSC 25, and H v Lord Advocate [2012] UKSC 24. See in regard to the latter Arnell, P., Extradition and the Best Interests of Children, (2012) (27) Scots Law Times 157.

[41] Khan v United Kingdom (2010) 50 E.H.R.R. 47.

prevention of disorder or crime). In *Khan* the ECtHR noted decision upon "necessary in a democratic society" (which entails a proportionality test), involved an assessment of various factors such as the seriousness of the offence, the nationalities of the concerned persons, the applicant's family situation etcetera.[42] The assessment of competing factors is *prima facie* specific to qualified human rights. As will be seen below, however, arguments for the application of a similar assessment to article 3, explicitly rejected by the ECtHR, have been accepted in fact. Regardless, it is clear that the ECtHR has developed a relatively detailed set of tests conditioning the application of human rights to extradition which make it difficult for claimants to prevent their extradition on that basis. This fact has led to only relatively few arguments against extradition being successful, even in the light of seemingly justifiable cases being made out, as in *Ahmad*.

Ahmad v United Kingdom

Ahmad v United Kingdom[43] is a conjoined judgment addressing the cases of six applicants, Babar Ahmad, Haroon Rashid Aswat, Syed Tahla Ahsan, Mustafa Kamal Mustafa (also known as Abu Hamza), Adel Abdul Bary and Khaled Al-Fawaz.[44] All six were sought by the United States on various terrorist-related charges. The extradition requests were accompanied by assurances that the death penalty would not be sought or carried out, that the trials of the applicants would be before a Federal Court and that the accused would not be designated enemy combatants. Whilst each applicant's case differed procedurally, generally similar arguments against extradition were put forward by each. These were that the diplomatic notes notwithstanding the risk of capital punishment, designation as enemy combatant and extraordinary rendition remained and that the possible sentences and "special administrative measures" they faced whilst in a federal prison violated human rights.[45]

The ECtHR judgment in *Ahmad* firstly laid out the applicable law. The arguments put forward by the applicants based on article 3 were distilled to two questions. These concerned the conditions of their detention and likely life imprisonment without parole and/or extremely long sentences of determinate length if convicted. Prior to addressing these, however, the ECtHR discussed the question of a possible UK prosecution and whether article 3 was relative in the extradition context. The issue of forum arose on account of the applicants arguing that the UK was the appropriate place for their prosecution.[46] It was averred that there were stronger links between them and their alleged with the UK than there were with the United States. The first and third applicants, for example, highlighted that the link to the United States in their cases took the form of a website computer server in Connecticut. In contrast, they argued, was considerable UK-based evidence and witnesses. The UK Government

[42] Ibid at para 39.
[43] Supra note 2. *Ahmad* is in certain respects similar to Edwards v United Kingdom (2012) E.H.R.R. 19. These are in regard to life sentences and the relative nature of article 3 in extradition cases.
[44] *Ahmad* held that the case of the second applicant should be considered separately. It was, and Aswat v UK, case 24027/07, was published 16 April 2013.
[45] The special administrative measures, it was argued, could include solitary confinement and the restriction of communications with legal representatives.
[46] The question of forum is topical once again with section 50 and schedule 20 of the Crimes and Courts Act 2013 introducing a new version of a forum bar into UK extradition law.

noted domestic proceedings were not underway and the applicants could not be tried for the "full range and gravamen" of their alleged conduct within it.[47] The ECtHR agreed and held that in light of the lack of any intention to prosecute within the UK the question of the appropriate forum did not arise.

Following deciding the forum point the ECtHR pronounced upon the nature of article 3 in the extradition context. [48] The Court addressed the three distinctions identified as existing in Convention jurisprudence by the House of Lords in R (on the application of Wellington) v Secretary of State for the Home Department.[49] These were between extradition and other forms of removal, between torture and other forms of ill-treatment and between the minimum level of severity required in the domestic and extraterritorial context.[50] In regard to the first it was held that the question of ill-treatment cannot hinge on the form of removal.[51] Concerning the second distinction the ECtHR agreed with the majority in the House of Lords that *Soering* did lend support for a distinguishing between torture and other forms of ill-treatment under article 3. It went on, however, to hold that subsequent to *Soering* it had "… normally refrained from considering whether the ill-treatment in question should be characterised as torture or inhuman or degrading treatment or punishment".[52] A reason given for this was the difficulty determining the severity of ill-treatment in extradition and other removal cases on account of the exercise being necessarily prospective.

Discussion of the purported distinction in the levels of ill-treatment required to engage article 3 domestically and extraterritorially entailed analysis of *Soering*[53] on the one hand and Chahal v UK[54] and Saadi v Italy[55] on the other. The ECtHR held that these cases should not be interpreted as leaving room for a balancing exercise between the risk of ill-treatment and the reasons for expulsion. It held assessment the level of severity can only be carried out independently of the reasons for the extradition or removal. The ECtHR held, implicitly, that article 3 applied on an absolute basis. It did so by providing that the assessment of whether the minimum level of severity has been met is to take place independently, and without a balancing exercise. An examination of the proportionality of an extradition had not taken place since *Soering*

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[47] Supra note 2 at para 163.

[48] Paragraphs 168 – 179 of *Ahmad* are identical to paragraphs 120 - 131 of Harkins and Edwards v UK, (2012) 55 E.H.R.R. 19, decided not long before.

[49] [2008] UKHL 72.

[50] These were identified by the ECtHR in *Ahmad*, supra note 2 at para 167.

[51] Ibid at para 168.

[52] Ibid at para 171.

[53] The germane paragraph of *Soering*, 89, *inter alia* states:

> "What amounts to "inhuman or degrading treatment or punishment" depends on all the circumstances of the case… As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases".

[54] (1997) 23 E.H.H.R. 413.

[55] (2009) 49 E.H.H.R. 30.

and so, in this regard, the ECtHR held that it had departed from the approach it then contemplated. Article 19 of the Charter was then referred to by the ECtHR as confirming the absolute approach. It provides that no one may be removed, expelled or extradited where there is a serious risk that he would be subjected to death, torture or other inhuman or degrading treatment or punishment.

Directly subsequent to its conclusions on the inseparability of torture from other forms of ill-treatment and the irrelevance of context in adjudging article 3 the ECtHR took a notable and significant *volte face*. It agreed with Lord Brown (dissenting) in *Wellington* that the absolute nature of article 3 did not mean that any form of ill-treatment will act as a bar to removal. It noted that it has repeatedly held that Convention standards are not to be applied on non-Council of Europe states. It stated "This being so, treatment which might violate art. 3 because of an act or omission of a contracting state might not attain the minimum legal of severity which is required for there to be a violation of art. 3 in an expulsion or extradition case".[56] In other words, the level of ill-treatment can vary between state parties and non-state parties. The ECtHR listed a number of factors decisive in intra-territorial article 3 cases, such as the presence of premeditation and an intention to debase or humiliate the applicant, and stated that they "… will not readily be established prospectively in an extradition or expulsion context".[57] The ECtHR concluded this point by noting that it has been very cautious in finding a removal would be contrary to article 3, especially where the requesting state "… had a long history of respect for democracy, human rights and the rule of law".[58]

The first substantive issue addressed by the ECtHR in *Ahmad* were the conditions at the ADX Florence prison, the likely place of incarceration of the applicants. The Court stated that in order for detention to give rise to a violation of article 3 any suffering and humiliation must go beyond that arising inevitably through incarceration. The ECtHR stated "… account has to be taken of the cumulative effects of these conditions, as well as of specific allegations made by the applicant. The length of the period during which a person is detained in the particular conditions also has to be considered".[59] The ECtHR then specifically addressed solitary confinement, recreation and outside exercise, and detention and mental health. Whether solitary confinement falls within the ambit of article 3, it held, turned upon the conditions, the stringency of the measures imposing it, its duration, the objective pursued and its effects on the person concerned. It was not *per se* in violation of article 3, and would be compatible in certain circumstances if accompanied by procedural safeguards.[60] Recreation and outdoor exercise, the ECtHR held, merited special attention as to its availability, duration and attendant conditions. In regard to mental health, the ECtHR noted that the detention of persons who are ill may raise issues under article 3, and that the provision of appropriate medical care is necessary.[61]

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[56] Ahmad, supra note 2 at para 177.
[57] Ibid at para 178.
[58] Ibid at para 179.
[59] Ibid at para 203 (footnotes omitted).
[60] Ibid at paras 205-212.
[61] As noted above the case of the second applicant, Haroon Aswat, was considered separately. On 16 April 2013 the ECtHR held that his extradition would entail a breach of article 3. The Court stipulated that this was on account of the severity of his mental illness alone.

The physical environment at ADX Florence, the ECtHR held, did not *per se* violate article 3. An argument that pre-placement procedural safeguards were lacking was dismissed. In regard to the restrictive conditions, including lack of human contact, the ECtHR held the US authorities would be justified in considering the applicants, if convicted, as significant security risks and in imposing limitations upon their communications. Although the conditions were highly restrictive, the ECtHR held, they do not amount to complete sensory isolation. In-cell stimulation in the form of television, books etcetera would exist. The isolation of inmates, the ECtHR held, was partial and relative. Significantly, there was a real possibility that applicants could gain entry to a "step-down" programme whereby the restrictive nature of their conditions would be lessened. Finally, the psychiatric services of the prison were held to be adequate in order to address the mental health conditions suffered by the applicants. Overall, the conditions at ADX Florence for all bar the second applicant were held not to violate article 3.

The possible sentences imposed on the applicants were then addressed. The ECtHR acted upon the assumption that the applicants would face the maximum possible sentence if convicted (a discretionary life sentence). It held that that sentence was not grossly disproportionate in light of the terrorist-related charges they faced. The fact that imprisonment was necessarily prospective led to a decision on whether a legitimate penological purpose was served by its continuation being unanswerable. However it was clear, the ECtHR held, that the sentences that could be imposed were reducible. The first, third, fourth and sixth applicants, therefore, had not demonstrated a real risk of treatment reaching the threshold of article 3. The fifth applicant, Adel Abdul Bary, was considered separately because he faced a greater possible punishment, that being multiple sentences of life imprisonment without the possibility of parole. The ECtHR held that in the absence of evidence of exceptional circumstances a sentence of life imprisonment without parole was not grossly disproportionate. There would be no violation of article 3 if he was extradited.[62]

The European Arrest Warrant

The Framework Decision of 13 June 2002, creating and governing European Arrest Warrants[63], is given effect by Part 1 of the 2003 Act. The Framework Decision creates a system of surrender of persons on the basis of the mutual recognition of arrest warrants issued by Member States. The operation of the EAW within the UK has given rise to a large number of cases addressing arguments made on the basis of human rights. The Framework Decision itself, however, does not require that executing territories consider them.[64] Human rights were not contemplated as a basis

[62] Ten further complaints raised by the fifth and sixth applicants were also rejected. These related the diplomatic assurances, possible suicide of the fifth applicant (under article 2), special administrative measures in violation of articles 3, 6, 8 and 14, a flagrant denial of justice (under article 6), a violation of their private and family life (under article 8) and the lack of an effective remedy (under article 13).

[63] For a description of the evolution of the EAW see Herlin-Karnell, E., From Mutual Trust to the Full Effectiveness of EU Law: 10 Years of the European Arrest Warrant, [2013] European Law Review 79.

[64] Article 1(3) provides that the Framework Decision shall not modify the obligation to respect human rights in article 6 of the TEU. Recital 12 provides that the Framework Decision respects fundamental rights. Finally, Recital 13 provides bars removal where there is

for refusal to act pursuant to a EAW.[65] As seen above however, the 2003 Act explicitly provides that surrender under a EAW must not contravene human rights. In UK law the Human Rights Act 1998 and, through it, the Convention have applied to the EAW since its inception.

The Convention has not only applied to the EAW in UK law as a result of the Human Rights Act 1998. It has applied on account of human rights being held by the ECJ to be a part of EU law. As is well known, in response to constitutional demands by Germany and Italy, in the first instance at least, the ECJ adopted human rights as general principles.[66] With the entry into force of the Treaty of Lisbon on 1 December 2009, however, human rights can be considered to have entered a new period. This follows the Treaty giving legal force to the Charter of Fundamental Rights.[67] The role of the Convention has also been given explicit recognition.[68]

The development of human rights in EU law is important in extradition terms both specifically and generally – although the effect to date in practice of this development has been minimal. Specifically, article 19(2) of the Charter provides "No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment". As seen, this accords with the position in ECtHR jurisprudence – the relativist discussion above noted. Generally, explicit EU human rights law in the form of the Charter now applies to the EAW. It is not settled, however, whether human rights law within the EU has been changed by this development or, instead, has been merely been clarified or regularised. Articles 51 and 52 of the Charter, entitled Field of Application and Scope and Interpretation of Rights and Principles respectively, support the view that the Charter is affirmative not additional.[69] The Baker Review stated on this point "… as a matter of domestic law the precise meaning and effect of the Charter is unclear. It appears from the Preamble that the purpose of the Charter was not to create a new and distinct body of rights: it was intended to make the fundamental rights already protected within the European Union '*more visible*'. If this view is correct, the Charter does not alter the nature of the obligations already imposed on Member States under European Union law".[70]

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a risk of capital punishment, torture, inhuman degrading treatment or punishment. This is mirrored in article 19 of the Charter, noted below.

[65] Mandatory and optional grounds for non-execution are found in articles 3 and 4 of the Framework Decision, and do not include human rights.

[66] Douglas-Scott has written "For over 40 years, fundamental rights have had a recognised status in the EU as 'general principles of law'… that protection… has evolved in an ad hoc, confusing, incremental way…", Douglas-Scott, S., The European Union and Human Rights After the Treaty of Lisbon, (2011) 11 Human Rights Law Review 645 at pgs 648-649.

[67] See in regard to the criminal law Marguery, T.P., The Protection of Fundamental Rights in European Criminal Law after Lisbon: What Role for the Charter of Fundamental Rights, (2012) 37(4) European Law Review 444.

[68] By Article 6(3) of the Treaty on European Union, as amended. Article 6(2) obliges the EU to accede to the Convention.

[69] See Blackstock, J., The EU Charter of Fundamental Rights: Scope and Competence, (2012) 9(1) Justice Journal 19.

[70] Baker Review, supra note 4 at para 571. Related to the role of the Charter within the UK (and Poland) is Protocol 30 to the Lisbon Treaty. To-date this "opt-out" has not had any effect, which is understandable if the Charter is merely affirmative of extant law. See further Belling, V., Supranational Fundamental Rights or Primacy of Sovereignty? Legal Effects of

Shedding some light on the nature of the application of the Charter to the EAW is the case of Re Request for Preliminary Ruling in the case of Ciprian Vasile Radu.[71]

Radu – the Advocate General's Opinion

Radu, a Romanian national, was the subject of four EAWs issued by Germany. He opposed his extradition in the Romanian courts, largely on human rights grounds. Radu's arguments, as interpreted, were put to the ECJ for a preliminary ruling. Both the Opinion of the Advocate General and the decision of the Grand Chamber are notable – although, of course, the Opinion has no legal force. The questions put to the ECJ were construed by the Advocate General as concerning three issues. These were the possible impact upon the Framework Decision of the Charter, the nature of the light to liberty in the requested state under the Charter, Convention and the Framework Decision, and whether the Framework Decision permitted the refusal to execute a warrant where the rights to liberty, fair trial and the presumption of innocence and right to a defence are violated in the requesting state. In addressing these questions Advocate General Sharpston stated articles 6, 48 and 52 of the Charter, relating to the right to liberty, presumption of innocence and right to a defence and scope of the Charter respectively, form part of the primary law of the Union. Articles 5 and 6 of the Convention, protecting the liberty of the person and right to a fair trial, constituted general principles. In regard to the right to liberty in the requested state the Advocate General confirmed it was engaged under the Charter and Convention when executing an EAW. She stated proceedings must take place with due diligence and the detention must be lawful and not arbitrary.

The question of whether the Romanian court could refuse to execute a EAW where it would infringe, or risk infringing, the requested persons human rights under articles 6, 48 and 52 of the Charter and articles 5 and 6 of the Convention was perhaps the most important of those posed. As noted, the focus of this argument were the circumstances in Germany and the issuance of the EAW there. The Advocate General stated that, *prima facie*, the answer was no. Human rights considerations cannot act as a ground for non-execution of an EAW. The grounds for refusing execution were listed in the Framework Decision, she noted, and they did not include the human rights of the requested person. Indeed, the grounds had been held to be exhaustive.[72] The purposes behind the Framework Decision were said to militate against a positive answer to the question.

Following adumbrating the factors supporting the position that human rights considerations cannot act as a basis for non-execution the Advocate General notably concluded otherwise. She stated that she did not believe that "… a narrow approach – which would exclude human rights considerations altogether – is supported either by the Framework Decision or by the case law".[73] Referring to article 1(3) of the Framework Decision she said "In my view, it is clear that the judicial authorities of an executing Member State are bound to have regard to the fundamental rights set out in the Convention and Charter when considering whether to execute a European arrest

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the so-called Opt-out from the EU Charter of Fundamental Rights, (2012) 18(2) European Law Journal 251.

[71] Supra note 3.

[72] In, for example, Wolzenburg, [2009] ECR I-9621.

warrant".[74] This is, in EU law, a significant and novel point. It is one, if followed and interpreted liberally could act to materially affect the operation of the EAW system.[75]

Radu – the Grand Chamber's Judgment

The Grand Chamber's decision in *Radu* stands in stark contrast to that of the Opinion of the Advocate General. It is, in comparison, summary and dismissive. The questions put to it were condensed to the single question of whether the Romanian court "… is entitled to examine whether the issue of a European arrest warrant complies with fundamental rights with a view, if that is not the case, to refusing execution even if that ground of non-execution is provided for in neither the Framework Decision 2002/584 nor in the national legislation which transposed that decision".[76] In other words, the Grand Chamber noted, Radu claimed "… that the provisions of Framework Decision 2002/584 deprive the Romanian executing authorities of the possibility of ascertaining whether the rights to a fair trial, to the presumption of innocence and to liberty which he derives from the Charter and the ECHR have been observed, where the contested European arrest warrants were issued without his having been summoned or having the possibility of hiring a lawyer or presenting his defence".[77] As noted above, it was not the proceedings of the executing authorities in Romania nor the prospective criminal trial in Germany itself that were the focus of Radu's argument but rather the actions of the EAW issuing authority in Germany. His argument relied upon the rights to liberty, a fair trial, a remedy, the presumption of innocence and the right to a defence.[78] In essence, the ECJ was faced with deciding whether it is possible for the executing judicial authorities to refuse to execute an EAW where the issuing authorities did not hear the requested person before the arrest warrant was issued.

Addressing the question as it defined it the ECJ firstly noted that the right to be heard is guaranteed by article 6 of the Convention and by articles 47 and 48 of the Charter. It then referred to the purpose of the Framework Decision, that being the replacement of the system of extradition with a system of surrender based upon the principle of mutual recognition. The new system sought to facilitate accelerated judicial co-operation based upon the high degree of confidence which should exist between Member States. Accordingly, the Court noted, article 1(2) of the Framework Decision obliges Member states to act upon receiving an EAW – with limited and explicit exceptions. These are mandatory exceptions governed by article 3 and optional exceptions under articles 4 and 4a. The ECJ noted that the issuance of an EAW without the requested person being heard was not a ground for non-execution of a warrant. Indeed, it stated such a ground for non-execution would "... inevitably lead to the failure of the very system of surrender... in so far as such an arrest warrant must

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[73] Supra note 3 at para 69.
[74] Ibid at para 73.
[75] The Advocate General proceeded to discuss the tests to be applied in coming to decisions on whether to refuse to execute a EAW. Notably she suggests the desirably to part with the tests as developed by the ECtHR, outlined above.
[76] Supra note 3 at para 23.
[77] Ibid at para 26.
[78] The Court held arguments based on the right to liberty were "... indissociable from his arguments relating to the infringement of his rights of defence in that Member State [the issuing State, Germany]", ibid. at para 30.

have a certain element of surprise, in particular to stop the person concerned from taking flight".[79] Further, the right to be heard will be observed in the executing Member State, the Court observed. It then concluded that executing judicial authorities cannot refuse to execute a warrant on the ground that the requested person was not heard in the issuing Member State before the arrest warrant was issued. The relatively abstract and general discussion found in the Advocate General's Opinion was, in the ECJ judgment, wholly absent.

Analysis

The human rights law under the Convention and Charter as applied to extradition has been described above. It clearly demonstrates that the popular perception that human rights law acts to the detriment of extradition and international criminal justice is a fallacy. The ECtHR has developed tests to be applied to the operation of human rights law in the extradition and removal context. These have, to date, been adopted by the ECJ. Although the tests vary, in some cases necessarily so on account of the entitlement in question, all are difficult to meet – they entail a high threshold. Adjectives attached to them include "stringent", "flagrant", "substantial" and "serious". Further, the onus is on the applicant to meet the test to the beyond reasonable doubt standard. As was seen in *Ahmad* human rights will not act as a barrier to extradition even in the face of life imprisonment without parole and very restrictive conditions of detention. It was not until 2012 and *Othman* that article 6 of the Convention was successfully invoked – a fact illustrating the exceptional nature of such cases. In *Radu* the Grand Chamber was dismissive of the notion that the Charter could be invoked as a ground of non-execution of a EAW – although the Advocate General's Opinion perhaps presages otherwise in the future. Of course human rights are often put forward in UK EAW cases, as well as non-EU Part 2 cases. The former are the result of the operation of section 21 of the 2003 Act, not the Framework Decision or the Charter. The latter come under section 87 of the 2003 Act. The vast majority of the considerable volume of cases heard in UK courts, applying the tests and burden as developed, are unsuccessful. Contributing to the public perception are not successful human rights arguments but rather the sheer number of cases arising and the publicity attendant to the rare successful instances.

A second point to note is that the entry into force of the Charter has not had an impact upon the operation of the EAW in EU law in the form of preventing surrenders. As the law stands, there is similarity between the human rights-related extradition law under the Convention and the Charter. The ECJ in *Radu*, to the extent that it referred to human rights at all, did so in conformity with the law as developed by the ECtHR. As noted, though, the Advocate General in *Radu* suggested otherwise. She relied upon article 1(3) of the Framework Decision, amongst other authorities, as the basis for suggesting that human rights could be a basis for the non-execution of a EAW. She also "took issue" with the extant tests and burden of proof. In regard to the right to a fair trial she suggested a test to the effect that the deficiency or deficiencies identified should be such to fundamentally destroy a trial's fairness. Were this test adopted by the ECJ there would be necessarily a divergence in law between article 47 of the Charter and article 6 of the Convention. This would *prima facie* be at odds with the conception of the Charter merely affirming existing legal protections. However,

[79] Ibid at para 40.

article 52(3) of the Charter does permit a divergence, providing "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". That noted, it is not unreasonable to foresee arguments based upon the prohibition on discrimination in article 21 of the Charter and article 14 of the Convention arising were this to happen.[80] As seen, though, as the law stands this development is wholly hypothetical.

The third point to make is that the ECtHR has accepted, in practice, a relativist approach to the application of fundamental human rights in an extradition context.[81] This is evident in *Ahmad*. It will be recalled that after rejecting the suggestion that the protection under article 3 could hinge on whether the purported violation occurred within or outwith the Council of Europe it largely accepted just that. The ECtHR held that not all forms of ill-treatment will act as a bar to removal. The crucial passage provided "… treatment which might violate art. 3 because of an act or omission of a contracting state might not attain the minimum legal of severity which is required for there to be a violation of art. 3 in an expulsion or extradition case".[82] The ECtHR up to this point had in *Ahmad* "… forcefully rejected the relativist approach proposed by the UK Government, favouring instead an absolute prohibition on any removal which potentially violates article 3".[83] Clearly the law on this point is opaque. As the ECtHR demonstrated, its case law subsequent to *Soering* established that article 3 protection is absolute, regardless of the form or ill-treatment and its place of past or future commission. Whilst emphasising that *Soering* on this point is no longer good law, it went on to follow it.

Conclusion

Extradition and human rights make odd bedfellows. They pull in different directions – one in pursuit of efficient and effective international criminal justice and the other seeking to protect individuals from egregious state action. The resultant difficulties are seemingly exacerbated by the involvement of third states, international and EU law, and, perhaps, a degree of national chauvinism. The development of an area of security, freedom and justice by the EU raises specific and contradictory pressures. The accession of the EU to the Convention does likewise. A solution that completely addresses the tensions and pressures arising through extradition is not possible. Instead the law must balance the opposing aims of efficient international criminal justice (within and outwith the EU) and the entitlements of those subjected to it. As is clear from the above, the law has been attempting to do just that.

Consideration of the (numerous) conflicts arising when human rights are argued in extradition cases by courts, national or European, takes time – and makes headlines. A perception that has arisen in the UK is that human rights act to the detriment of

[80] It is beyond the scope of this article to examine the possible ramifications of a divergence in interpretation between similar provisions in the Charter and Convention.
[81] See Williams, J., Extradition, Extra-Territoriality and Article 3 ECHR: An Absolute Case of Relativism, (2012) Irish Bar Review 138.
[82] *Ahmad*, supra note 2 at para 177.
[83] Williams, supra note 81 at p 139.

extradition and reasonably efficient international and European criminal justice. This is just not the case. The apparent issues and problems arising in extradition law in fact do not concern human rights issues[84] directly. Rather it is the sheer scale of cases arising and the time required to consider them appropriately which are the basis of legitimate concern. The particular prosecution policies of certain of the UK's extradition partners, in particular that of Poland, has engendered a very considerable case-load and burden on UK courts. Human rights are correctly considered in the context of extradition. No state should knowingly be complicit in a violation of human rights through extradition. The ECtHR and EJC, however, face uncomfortable decisions. *Ahmad* illustrates the difficulties facing the principle of absolutism in human rights protection. Belying popular belief, the ECtHR has distinguished between forms of ill-treatment on the basis of geography. It professed absolutism and decided otherwise. Human rights, only very exceptionally, prevent the extradition pf requested persons.

[84] Assuming that extradition may affect human rights only detrimentally is misplaced. The Baker Review notes that the "… effective operation of the European arrest warrant system is likely to bring in its wake improvements in the administration of justice [and] contribute to more effective compliance with the reasonable time requirement contained in Article 6 of the Human Rights Convention".